

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the appropriate date of accident in this matter?
- (2) What is the nature and extent of claimant's injury and disability, including which insurance company should be liable for claimant's permanent partial disability?
- (3) What is the appropriate average weekly wage?
- (4) Was the award correctly calculated?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record contained herein, the Board finds that the Award should be modified with regard to the rate at which claimant's functional impairment was paid and the number of weeks of temporary total disability compensation claimant is entitled, but affirmed as to all other issues.

Additionally, the Board modifies the Award with regard to the Order that Zurich and Travelers are granted reimbursement from the Kansas Workers Compensation Fund (Fund).

Claimant, a nearly 20-year employee of respondent, developed bilateral upper extremity injuries working for respondent. Her symptoms began in 1995 and continued through her last day worked in 1999. However, on May 16, 1996, claimant was returned to work after receiving medical treatment with Tyrone D. Artz, M.D., having attained maximum medical improvement. Permanent work restrictions of no more than 4 hours of computer work per day were imposed at that time.

It is acknowledged claimant continued working for respondent until her layoff on August 17, 1999. However, while claimant's condition did wax and wane by the time claimant terminated her employment, her testimony was that her condition had improved. Claimant ultimately underwent surgery for her carpal tunnel conditions, but, as noted in the Award, claimant was always able to return to her previous level of function so long as her computer work was limited to no more than 4 hours per day. The finding by the Administrative Law Judge that claimant's condition was medically stable as of May 16, 1996, is supported by the evidence. The findings and conclusions of the Administrative Law Judge are well set forth, and the Board adopts those findings and conclusions as its own regarding the May 16, 1996 date of accident.

With regard to liability for the permanent disability, the date of accident controls that issue. However, the Administrative Law Judge found claimant entitled to a functional impairment of 10 percent to the body and a work disability from and after August 17, 1999 at 40 percent to the body. Again, the Award sets out findings of fact and conclusions of law in some detail, and the Board adopts those findings and conclusions as its own. The analysis of the Administrative Law Judge regarding claimant's functional impairment, as well as her wage and task losses calculated pursuant to K.S.A. 1996 Supp. 44-510e, are again well set out, and the Board adopts those findings and conclusions as its own.

There was a dispute raised regarding the appropriate average weekly wage utilized in this matter. At oral argument, the parties clarified the issue as involving only the use of fringe benefits in the average weekly wage prior to claimant's termination of employment on August 17, 1999. In all other regards, the parties stipulated that the average weekly wages computed by the Administrative Law Judge were appropriate.

K.S.A. 44-511(a)(2) (Furse 1993) defines "additional compensation" to include cash bonuses and any employer-paid life, health or accidental injury insurance. In this instance, the numbers stipulated by the parties include, for the date of accident of May 16, 1996, straight time at \$7.20 per hour, which computes to a straight time wage of \$288, plus average overtime of \$2.08 per week. This calculates to a weekly wage of \$290.08 without the fringe benefits. Thereinafter, it was also agreed that claimant's wage would include the value of bonuses paid in the amount of \$13.41 per week and insurance benefits in the amount of \$41.54 per week. These items of additional compensation were provided to claimant through her August 17, 1999 termination.

Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued.¹

Therefore, any sums paid to claimant based upon claimant's May 16, 1996 average weekly wage would be computed without the additional fringe benefits until claimant's August 17, 1999 termination.

With regard to claimant's functional impairment, claimant was awarded a 10 percent impairment to the body as a whole. This computes to 41.39 weeks of compensation. With a date of accident of May 16, 1996, the entire 41.39 weeks of functional impairment would be due and owing prior to claimant's termination of employment. Therefore, the rate of payment of benefits based upon claimant's functional impairment would be at the reduced rate of \$193.40 per week based upon the \$290.08 average weekly wage, excluding the fringe benefits. The Award of the Administrative Law Judge in this regard is modified to show the appropriate award of weekly benefits.

¹ K.S.A. 44-511(a)(2) (Furse 1993).

With regard to the permanent partial disability award based upon the 40 percent permanent partial general disability to the body as a whole and with regard to the temporary total disability compensation, the Board finds that those weeks accrued after August 17, 1999. Therefore, the appropriate average weekly wage for the May 16, 1996 date of accident would include the fringe benefits. The computation by the Administrative Law Judge of an average weekly wage of \$345.03, equating to a weekly payment of \$230.03 for those periods, is affirmed.

Additionally, with regard to the temporary total disability compensation, it was stipulated by the parties that claimant was paid \$1,047.80 by Zurich, with an identical amount paid by Travelers. This was paid at the rate of \$206.68 per week for the period June 12, 2000 through August 22, 2000. Additionally, Safeco paid temporary total disability for 6 weeks totaling \$1,550.32. The Award of the Administrative Law Judge grants only 6 weeks temporary total disability compensation. The weeks stipulated to by the parties and the amount paid compute to 16.14 weeks of temporary total disability compensation. Additionally, as the temporary total disability compensation was paid after claimant's termination of employment, the increased weekly rate of \$230.03 would be appropriate. Therefore, the Award will be modified to award 16.14 weeks of temporary total disability compensation to be paid at the rate of \$230.03 per week in the amount of \$3,712.68.

A final modification to the Award involves the Order that Zurich and Travelers be reimbursed from the Fund for monies paid pursuant to an earlier order of the Administrative Law Judge. K.S.A. 1996 Supp. 44-556(e) states in part:

If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer, the employer's insurance carrier or the workers compensation fund during the pendency of review under this section, and the employer, the employer's insurance carrier or the workers compensation fund, which was held liable for and ordered to pay all or part of the amount of compensation awarded by the board, is held not liable by the final decision on the appeal or review for the compensation paid or is held liable on such appeal or review to pay an amount of compensation which is less than the amount paid pursuant to the award, **then the employer, employer's insurance carrier or workers compensation fund shall be reimbursed by the party or parties which were held liable on such appeal or review to pay the amount of compensation to the worker that was erroneously ordered paid. The director shall determine the amount of compensation which is to be reimbursed to each party under this subsection, if any, in accordance with the final decision on the appeal or review and shall certify each such amount to be reimbursed to the party required to pay the amount or amounts of such reimbursement.** Upon receipt of such certification, the party required to make the reimbursement shall pay the amount or amounts required to be paid in

accordance with such certification. No worker shall be required to make reimbursement under this subsection or subsection (d). (Emphasis added.)

K.S.A. 1996 Supp. 44-556(e) obligates that when insurance carriers or the Fund overpay as a result of orders, rather than seeking reimbursement from the Fund, instead a determination is to be made by the Director's office as to what amounts would be due and owing from the various insurance carriers to other insurance carriers involved in the litigation.

In *Lott-Edwards*,² the Kansas Court of Appeals affirmed the Board's determination that an insurance company be made responsible for the benefits incurred and paid during its period of coverage.³ The Kansas Court of Appeals also affirmed the Board's order in *Lott-Edwards* that Travelers reimburse National Union for any temporary total disability compensation and medical benefits incurred and paid by National Union after Travelers' coverage commenced.

The Board, therefore, finds that the Order by the Administrative Law Judge that Zurich and Travelers be reimbursed from the Fund should be reversed and, pursuant to K.S.A. 1996 Supp. 44-556(e), each insurance company will be made responsible for the costs and benefits paid during its coverage period. The insurance company on the risk on the date of accident on May 16, 1996, is liable for the permanent partial disability compensation awarded and future medical treatment.

In the Award, the Administrative Law Judge calculated the 40 percent work disability as involving 98.12 weeks of compensation. The Board determined an actual amount of 124.5 additional weeks was due and owing. The Award is modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated October 25, 2002, should be, and is hereby, modified to grant claimant an award of a 10 percent permanent functional impairment to the body as a whole, followed by a 40 percent permanent partial general disability to the body as a whole from and after August 17, 1999.

The Award is based upon a date of accident of May 16, 1996, and calculated based upon the average weekly wages as above modified.

² *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

³ *Supra*, at 697.

Claimant is entitled to 16.14 weeks temporary total disability compensation at the rate of \$230.03 per week totaling \$3,712.68, followed by 41.39 weeks permanent partial general disability compensation at the rate of \$193.40 totaling \$8,004.83, followed thereafter by an additional 124.15 weeks permanent partial general disability compensation at the rate of \$230.03 totaling \$28,558.22, for a total award of \$40,275.73.

As of the date of this Award, the entire amount is due and owing in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Matthew J. Thiesing, Attorney for Respondent and Safeco
William L. Townsley, III, Attorney for Respondent and Travelers
Maureen T. Shine, Attorney for Respondent and Zurich
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation